107

(3)

No. 07-1539

Supreme Court, U.S.
FILED
OCT 1 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

QUESTIONS PRESENTED FOR REVIEW:

- Does the Application of the "One-Book" Rule in this case violate the *Ex Post Facto* Clause of the United States Constitution?

- Should the test district courts apply when admitting summary charts be clarified so as to achieve more uniform rulings?

- Is tax evasion a continuing offense for purposes of determining the application of the statutes of limitation?

UNITED STATES SUPREME COURT

Leslie D. Mower v. United States of America

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES ii

ARGUMENT 1

CONCLUSION 21

TABLE OF CITED AUTHORITIES

CASES

Burns v. United States,
501 U. S. 129 (1991) 3, 4
Holland v. United States,
348 U.S. 121 (1954), *reh. denied*,
348 U.S. 932 (1955) 12
Irizarry v. United States,
128 S.Ct. 2198 (2008) 2, 3, 9
Norwitt v. United States,
195 F.2d 127 (9th Cir. 1952) 18
Steele v. United States,
222 F. 2d 628 (5th Cir. 1955) 14

United States v. Anderson,
319 F.3d 1218 (10th Cir. 2003) 21
United States v. Bailey,
123 F.3d 1381 (11th Cir. 1997) 8, 9
United States v. Bertoli,
40 F.3d 1384 (3d Cir. 1994) 7, 8
United States v. Booker,
543 U.S. 220 (2005) 3, 4, 5
United States v. Bray,
139 F.3d 1104 (6th Cir. 1998) 11
United States v. Casamento,
887 F.2d 1141 (2nd Cir. 1989) 15
United States v. Citron,
783 F. 2d 307 (2nd Cir. 1986) 14
United States v. Cooper,
35 F.3d 1248 (8th Cir. 1994) 8, 9
United States v. Daniels,
986 F.2d 451 (11th Cir. 1993) 15
United States v. Demaree,
459 F.3d 791 (7th Cir. 2006) cert. denied,
127 S. Ct. 3055 (2007) 2
United States v. Diez,
515 F.2d 892 (5th Cir. 1975) 11
United States v. Gray,
876 F.2d 1411 (9th Cir. 1989) 19
United States v. Harms,
442 F.3d 367 (5th Cir. 2006) 15
United States v. Johnson,
319 U.S. 503 (1943) 19
United States v. Johnson,
123 F.2d 111 (7th Cir. 1941) 19
United States v. Kilkenny,
493 F.3d 122 (2d Cir. 2007) 2

United States v. Kirkman,
755 F. Supp. 304 (D. Idaho, 1991) 19, 20
United States v. Mann,
884 F.2d 532 (10th Cir. 1989) 15
United States v. McGill,
964 F.2d 222 (3rd Cir. 1992) 18
United States v. Means,
695 F.2d 811 (5th Cir. 1983) 13
United States v. Milkiewicz,
470 F.3d 390 (1st Cir. 2006) 15
United States v. Ortland,
109 F.3d 539 (9th Cir. 1997) 7, 8
United States v. Pollen,
978 F.2d 78 (3rd Cir. 1992) 19, 20
United States v. Sullivan,
98 F.2d 79 (2nd Cir. 1938) 19, 20
United States v. Thompson,
518 F.3d 832 (10th Cir. 2008) 5, 9
United States v. Wood,
486 F.3d 781, 790 (3d Cir.), cert. denied,
128 S. Ct. 130 (2007) 2

CONSTITUTIONS, STATUTES, RULES

26 U.S.C. §7201 (1982) 19
U.S.S.G. ch. 1, pt. A, §4(b) (Nov. 1987),
reprinted in §1A1.1 comment., editorial
note (Nov. 2007) 3, 4
U.S.S.G. ch. 1, pt. A, §4(b) (1990) 4
U. S. S. G. §1B1.11 (Nov. 1993) 6, 7, 8, 9
Fed. R. Evid. 1006 ..... 11, 16

Leslie Mower, Appellant/Defendant ("Leslie"), in response to the United States opposition to her petition states:

ARGUMENT

1. The government contends "the *Ex Post Facto* Clause does not apply to changes in advisory Guidelines." (Resp. Brief, 8.) This sweeping assertion is not supported by the decisions of this Court, and would subject citizens to clear violations of the *Ex Post Facto* Clause.

The government argues there cannot be any violation of the *Ex Post Facto* Clause in the application of the sentencing guidelines because they are no longer mandatory. (Resp. Brief, 7). There remains, however, disagreement between the circuits on whether the *Ex Post Facto* Clause should apply to the guidelines. The government concedes the conflict between circuits,

citing decisions in both the Second and Third Circuits which have applied the rule[1], while also citing a previous decision of the Seventh Circuit which did not[2]. As is apparent, there remains confusion among the circuits as to whether or not the *Ex Post Facto* Clause applies to the sentencing guidelines. Certiorari should be granted to resolve this conflict.

The government misconstrues this Court's most recent decision in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), to argue this Court has clarified the operation of the advisory Guidelines. See Resp. Brief, 8. The *Irizarry* Court held the starting point in the sentencing determination, and "[a]ny expectation subject to **due process protection** at the time [this

---

[1]See Resp. Brief, p. 7 (citing *United States v. Kilkenny*, 493 F.3d 122, 126-127 (2d Cir. 2007); *United States v. Wood*, 486 F.3d 781, 790 (3d Cir.), cert. denied, 128 S. Ct. 130 (2007)).

[2]See Resp. Brief, p. 7 (citing *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) cert. denied, 127 S. Ct. 3055 (2007)).

Court] decided *Burns* that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive [the] decision in *United States v. Booker*, 543 U.S. 220." *Id.* at 2202 (emphasis added).

This Court's decision in *Irizarry* did not limit the constitutional protections of the *Ex Post Facto* Clause. *Id.* It merely limits the broad requirements of Rule 32(h) of the Federal Rules of Criminal Procedure and provides that notice to a criminal defendant of an upward variance in the Guidelines range is not required, and will not offend the Due Process Clause. *Id.* While the subject matter of the *Irizarry* decision is not on point, the dissenting opinion, provides this further insight:

> Courts, while now free to impose sentences that vary from a Guideline-specified range, have *always* been free to depart from such a range. See USSG ch. 1, pt. A, § 4(b) (Nov. 1987),

> reprinted in § 1A1.1 comment., editorial note (Nov. 2007) (suggesting broad departure authority). Indeed, even *Burns* recognized that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure." 501 U. S., 136-137 (citing USSG ch. 1, pt. A, §4(b) (1990)). Regardless, if *Booker* expanded the number of grounds on which a district court may impose a non-Guideline sentence, that would seem to be an additional argument *in favor of*, not *against*, giving the parties notice of the district court's intention to impose a non-Guideline sentence for some previously unidentified reason. Notice, after all, would promote "focused, adversarial" litigation at sentencing. *Burns*, *supra*, at 134, 137.

Id. at 2206, J. Breyer joined with J. Kennedy, J. Souter, and J. Ginsberg, dissenting.

The application of the *Ex Post Facto* Clause to the use of sentencing guidelines is equally relevant to the application of due process. The concern remains that application of the guidelines, whether mandatory or not, affects the sentencing possibilities of a citizen. If they are to change there remains an *Ex Post Facto* right requiring protection.

Leslie's argument remains valid: whether the One-Book rule adopted in *Booker*, and as applied in this case, violates the *Ex Post Facto* Clause. This issue is ripe for review.

The government mistakenly contends the issue does not bear on petitioner's sentencing. In this matter, the Tenth Circuit Court of Appeals affirmed the District Court's approach of combining separate tax evasion offenses and sentencing Leslie, pursuant to revised Guidelines in effect on the date of the last alleged offense. *See United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008). Leslie was convicted of conspiracy and tax evasion for years 1992-1997. *Id.* There were *three* different versions of the Sentencing Guidelines available for the District Court to use: 1993, 2001, and 2005. The District Court computed the tax loss using the 2005 Sentencing Guidelines but

determined her sentence using the 2001 Sentencing Guidelines. *Id.*, see also Doc. 259. Although acts of conspiracy were found to have occurred after 2001, the conspiracy count did not apply to all six counts of tax evasion. Therefore, all six counts of tax evasion should not have been computed under the 2001 or 2005 revised Guidelines. The District Court applied policy statement §1B1.11(b)(3) in a mandatory fashion, using the revised guidelines and violating the *Ex Post Facto* Clause. Leslie's sentence was affected by the District Court's sentencing. That was inconsistent and unfair to Leslie.

The circuits remain divided on the question of whether sentences consistent with Section 1B1.11(b)(3) and the One-Book rule violate the *Ex Post Facto* Clause. Both the Ninth Circuit and the Third Circuit remain of the view that it does. *See United States v.*

Bertoli, 40 F.3d 1384, 1405 (3d Cir. 1994) (holding that the One-Book rule does not override *Ex Post Facto* concerns, stating "[t]he so-called rule is inconsistent.and other cases in this Court...have prohibited the application of more stringent penalties than were authorized at the time of the offense."); *see also United States v. Ortland*, 109 F.3d 539, 546 (9th Cir. 1997) (holding that "[e]ven if the later offense is sentenced at a higher level, that does not undercut the fact that the earlier offenses cannot be," and expressly stating the policy statement of §1B1.11(b)(3) violated the *Ex Post Facto* Clause of the constitution).

Contrarily, the Eleventh Circuit determined the application of §1B1.11(b)(3) did not violate the *Ex Post Facto* Clause even though it resulted in a harsher sentence for an offense committed prior to enactment of the Sentencing Guidelines in effect at the time of the

sentencing in *United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997). Further, in *United States v. Cooper*, 35 F.3d 1248, 1250-53 (8th Cir. 1994), a defendant committed three separate firearm offenses, two committed prior to the effective date of an updated version of the Sentencing Guidelines, and the court affirmed application of the revised Sentencing Guidelines even though it resulted in an increased penalty.

The Circuit decisions regarding this issue are irreconcilable. Both the Third and Ninth Circuits have held that separate offenses, whether or not the same crime, should be analyzed and the defendant sentenced under the corresponding Guidelines in effect when each separate offense occurred. See *Bertoli*, 40 F.3d at 1405); see also *Ortland*, 109 F.3d 539. These Circuits found that applying the policy of §1B1.11(b)(3) violated

the *Ex Post Facto* Clause of the Constitution. *Id.* However, the First, Second, Eighth, Tenth, and Eleventh Circuits have held that separate offenses should be sentenced under the version of the Guidelines in effect at the time of the last act. See *Bailey*, 123 F.3d at 1403-07; *Cooper*, 35 F.3d at 1250-53; *Thompson*, 518 F.3d at 869-70. These Circuits found no violation of the *Ex Post Facto* Clause because the Guidelines' policy statement §1B1.11(b)(3) states that no such violation occurs.

The law is in conflict on this issue. The approach taken by the First, Second, Eighth, Tenth, and Eleventh Circuits violates the plain language of the *Ex Post Facto* Clause. It deprives U.S. citizens of due process of law by failing to provide notice of more severe penalties after the Sentencing Guidelines are revised. This Court's decision in *Irizarry* does not

nullify this conflict.

Citizens are denied consistent treatment of sentencing dependent upon which Circuit Court reviews their case. The same acts in the Ninth Circuit will result in a defendant receiving fair sentencing under the Sentencing Guidelines in effect when his crime was committed, whereas the same defendant in the Tenth Circuit will receive harsher sentencing under the Sentencing Guidelines in effect on the date he committed his last crime. This is the kind of disparate result which violates equal protection standards of the Constitution.

This Court must clarify the appropriate test for the application and use of the Sentencing Guidelines in order to ensure equal treatment in each Circuit, while also protecting constitutional freedoms.

2. The government wrongly contends no review of the admission of summary charts is warranted because the District Court delivered a limiting instruction and Leslie had an opportunity to cross-examine the IRS agent. In this case the Government prepared and presented summary charts that grossly distorted the evidence and the District Court failed to provide adequate safeguards to prevent prejudice. The lack of clarity in admitting summary charts and the standards governing admission warrant this Court's review.

Rule 1006 of the Federal Rules of Evidence requires that "a summary document 'must be accurate and nonprejudicial.'" *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). Although the decision whether to allow the use of summary charts lies within the district court's discretion, *see United States v. Diez*, 515 F.2d 892, 906 (5th Cir. 1975), courts recognize the

danger of using summary charts because the jury may use the charts exclusively in arriving at a verdict, rather than examining the primary evidence the charts purport to summarize. *Holland v. United States*, 348 U.S. 121, 127-8 (1954), *reh. denied*, 348 U.S. 932 (1955). There is danger of substantial prejudice because figures on charts give an aura of authenticity to the government's allegations: "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Id.* at 128.

In this case, the jury relied on exaggerations contained in charts to convict Leslie. The District Court later found the charts the jury relied upon to be overstated and erroneous. However, the jury was never instructed about this embellishment; indeed their decision had already been made.

First, the Government's exhibits attributed personal income to Leslie of $3,775,764 and unreported income of $3,209,815. (Ex. 80-3). Specifically, the charts stated that foreign corporate commission was personal income to Leslie instead of properly categorizing it as corporate income. *Id.* Considering the evidence in favor of the Government, the District Court found Leslie had unreported income of less than 10% of that amount: $318,256. (Doc. 59, ¶16). Yet, the District Court allowed the summary charts to remain before the jury and allowed the jury to rely upon the charts throughout the two week trial. This is just the sort of improper and prejudicial information that prior courts have warned should not be admitted. *See United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983). It was admitted because of an abuse of discretion allowed by an uncertain rule.

The inaccurate summary charts remained visible to the jury during the entire two-week trial. They were brought into the jury room during deliberation. Although the District Court found that the $2,709,403 in foreign commission was not personal income to Leslie, it could not reduce or eliminate the prejudice of these overstated figures from the summary charts in one limiting instruction. (Doc. 259, ¶¶ 15-16). This was an abuse of discretion. *See, e.g., United States v. Citron*, 783 F.2d 307, 316-317 (2d Cir. 1986) (holding that the admission of summary chart exhibits was an abuse of discretion when there was no foundation laid for the figures in the summary.); *Steele v. United States*, 222 F.2d 628, 629 (5th Cir. 1955) (reversing admission of summary chart exhibits when there were significant "omissions, interpretations and discrepancies between the record and these exhibits

and a considerable portion of the testimony.")

In some Circuits, the district court's discretion to allow use of summary charts has been upheld merely because of a limiting instruction given to the jury. *See United States v. Harms*, 442 F.3d 367, 376 (5th Cir. 2006); *United States v. Daniels*, 986 F.2d 451, 456 (11th Cir. 1993); *United States v. Casamento*, 887 F.2d 1141, 1151 (2nd Cir. 1989); *United States v. Mann*, 884 F.2d 532, 539 (10th Cir. 1989). As in Leslie's case, this instruction is insufficient to erase the "aura of authenticity" surrounding summary chart exhibits.

Other Circuits have followed a separate standard. The First Circuit in *Milkiewicz* adopted a standard that if applied in this case likely would have resulted in a different finding. *See United States v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006). The *Milkiewicz* Court upheld the use of summary chart

exhibits because "the district court exercised discretion with meticulous care," including requiring the government to modify the summaries to eliminate unnecessary and potentially prejudicial information and labels, and explicitly considering "the usefulness versus the potential misuse of summaries of this nature." *Id.*

Specifically, the First Circuit approved of steps taken by the trial court in that case for the admission of summary charts under Federal Rule of Evidence 1006. *Id.* Under this standard, the district courts would be required to (1) modify the chart summaries to eliminate unnecessary and potentially prejudicial information and labels, (2) weigh the usefulness of the chart with the potential misuse of the summaries, and (3) provide a limiting instruction to the jury regarding the use of summary charts. *Id.* While that should

have happened here, it did not. The rule does not yet require it.

The Circuits are in desperate need of clarification of the standard for admission of summary chart exhibits. The government recognizes instances where summary chart exhibits are inadmissible due to the prejudice from the charts themselves (Resp. Opposition, 13). This case is such an instance. The Circuits are divided on whether a limiting instruction is sufficient, or whether greater protections are necessary to eliminate any prejudice resulting from such exhibits. Adoption of a uniform rule, as was applied by the First Circuit, would provide uniformity and direction to the district courts in admitting summary charts, while also guarding against inconsistent and prejudicial results to the parties.

3. The government incorrectly asserts the issue in this case is not whether tax evasion is a continuing offense, but when the statute of limitations begins to run for tax evasion. (Resp. Opposition, 15). Whether the continuing offense doctrine applies to multiple years of tax evasion is the first step in determining the appropriate statute of limitations. This Court must clarify whether tax evasion is a continuing offense. The law is unclear, irreconcilable, and inconsistent in its application. Therefore, the issue warrants this Court's review.

Courts considering Congress' intent have found attempted tax evasion not to be a continuing offense. See eg., *United States v. McGill*, 964 F.2d 222, 230 (3rd Cir. 1992); *Norwitt v. United States*, 195 F.2d 127, 133 (9th Cir. 1952) ("An attempt to evade a tax and payment thereof is not a continuing offense"); *United*

States v. Sullivan, 98 F.2d 79, 80 (2nd Cir. 1938)(holding an attempt to evade income tax is a separate offense for each year); *United States v. Kirkman*, 755 F. Supp. 304, 306-08 (D. Idaho, 1991) (concluding tax evasion is not a continuing offense); *see also United States v. Johnson*, 123 F.2d 111, 119 (7th Cir. 1941), reversed on other grounds in *United States v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546. The Third Circuit found the plain language of Section 7201 "evidences the congressional intent to allow distinct, significant, affirmative acts of tax evasion to constitute separate section 7201 offenses." *United States v. Pollen*, 978 F.2d 78, 86 (3rd Cir. 1992); *see also United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989) (holding that the doctrine of continuing offenses should not apply "unless the explicit language of the substantive criminal statute compels such

conclusions, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as one.")

In this case the District Court concluded the statute of limitations began to run on Counts Two through Five, which relate to the tax years 1992 through 1995, upon the filing of amended corporate tax returns for Neways, Inc. filed in September and October 1998. (Doc. 221 Memorandum Decision 8/19/05, 7). Relying upon the amended corporate returns was an error. As discussed above, an attempt to evade income tax is a separate offense for each year. *Sullivan*, 98 F.2d at 80; *Kirkman*, 755 F. Supp. at 306-08; *Pollen*, 978 F.2d at 86. The District Court lumped the tax years together, in clear violation of *Sullivan*, 242 F.3d at 1254 and *Pollen*, 978 F.2d at 86. Further, the Tenth Circuit ignored its own precedent,

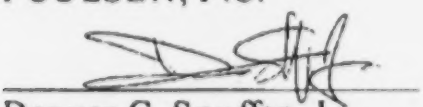
by upholding Leslie's conviction using an incorrect standard of the statute of limitations in tax evasion cases. Under *United States v. Anderson*, 319 F.3d 1218 (10th Cir. 2003), the statute of limitations begins to run on the date of the last affirmative act of evasion *for each count*, not the last count alleged in the indictment. This Court must clarify these inconsistencies.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court accept her Petition and grant Certiorari to review the issues affecting her.

Dated this 1st day of October, 2008.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.



Denver C. Snuffer, Jr.,
Attorneys for Leslie D. Mower

No. 07-1539

In The

Supreme Court of the United States

LESLIE D. MOWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

CERTIFICATE OF SERVICE OF REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

Denver C. Snuffer, Jr.
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

CERTIFICATE OF SERVICE

I hereby certify that on October 1st, 2008, I mailed the foregoing REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI to the Clerk of Court, and I hereby certify that I have mailed by United States Postal Service or other carrier the document to the Clerk of the Court and to the following:

Gregory G. Garre
Acting Solicitor General of the United States
Counsel of Record
Nathan J. Hochman
Assistant Attorney General
Alan Hechtkopf
Karen M. Quesnel
Elissa Hart-Mahan
Attorneys
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001

Brett Tolman, United States District Attorney
Caryn D. Mark, Esq.
Greg Davis, Esq.
c/o United States Attorney's Office
185 South State Street, #400
Salt Lake City, Utah 84111

Executed on October 1st, 2008.

By: _____
Denver C. Snuffer, Jr.
Attorney for Leslie D. Mower